BOOK REVIEWS

EDWARD GLUCK, *Editor-in-Charge*

CASES ON THE LAW OF EVIDENCE. By EDWARD W. HINTON. St. Paul: WEST PUBLISHING COMPANY. 1919. pp. xxiii, 1098.

Painstaking labor and sound judgment are required in the preparation of a good casebook. In Hinton's "Cases on Law of Evidence" both these qualities are present in a high degree, and the result is a work of unusual excellence.

The arrangement and terminology employed in the book are clear and simple, though original in some respects. That they are not wholly original is a distinct merit in the book, for much that is called originality is merely a difference which is forced upon the new writer because some prior writer has pre-empted the best. Difference is not necessarily improvement, and in a book intended for students an unoriginal better should always be preferred to an original worse. It is certainly a pleasure to see that the editor has used in his chapter and subdivision headings the simple straightforward terms which are familiar to the law, without any strained endeavor to employ some substitute.

The first chapter of the book deals with the subject of "The Court and the Jury", and the first topic in this chapter is that of "The Burden of Proof". This is a natural and logical order of beginning, because every lawyer in preparing a case for trial has, as his first task, to find out what he is bound to prove, and this requires a knowledge of the law that defines and regulates the burden of proof. Under this heading, Professor Hinton has collected cases illustrating the two meanings of the term burden of proof,—the burden of establishing a proposition and the burden of going forward with evidence,—and also cases dealing with the apportionment of these two burdens, including cases illustrating the effect of presumptions.

The next topic is that of "Judicial Notice", which is followed by that of "Admission and Exclusion of Evidence". Under this last heading are collected cases dealing with law and fact, including an excellent selection of cases illustrating the functions of the court on the *voir dire*.

The second chapter deals with the subject of witnesses. Professor Hinton suggests (preface, p. x) that this arrangement is advantageous because of the light it may throw on other topics in evidence, *e. g.*, the hearsay rule. This advantage seems somewhat dubious, as other topics may throw equal light on the subject of examination of witnesses. However, inasmuch as law students frequently engage in moot trials in law clubs and practice courts before they have completed their course in evidence, and inasmuch as they have to use the rules as to examining witnesses from the very beginning of their trial work in every case, (whereas other rules may not happen to be called for in any single trial) there are practical advantages from the standpoint of the student in placing the topic of examination of witnesses early in the course.

The subject of "Witnesses" is dealt with in great fulness, covering 307 pages,—nearly one-third of the book. It is of course a portion of

trial procedure with which a lawyer must be acquainted, but which if covered in the law school in its main details, can and generally will be mastered later through practice, a mastery which is less likely to be thus secured in some other portions of the law of evidence. In view of the large amount of material to be covered in other parts of the subject, it seems as if a briefer treatment of this topic might have been preferable.

In the chapter on "Hearsay" we have a departure from the arrangement in Thayer's "Cases on Evidence", in that Professor Hinton classifies "Admissions" and "Confessions" as exceptions to the hearsay rule. This runs counter to the well known statement of Mascardus that a confession is rather a relief from the burden of proof, than properly speaking, proof itself.[1] In the case of most exceptions to the hearsay rule, the hearsay statement may be used against some one other than the speaker; in the case of an admission or confession, however, the statement (if we exclude the anomalous doctrine of admissions made by a prior owner) is used only against the party making it and goes to prove, not so much that the thing admitted is so, but rather that as against the party making the admission, no proof of the admitted fact is necessary. In other words, the effect of the admission outside of court is the same as the effect of the admission by way of pleading, with the important difference that the former admission may be explained away by other evidence. However, there is force in the argument that the distinction between admissions and other hearsay is one of analytical nicety rather than of practical importance, inasmuch as either a confession or an admission is an unsworn reported statement which, if it does not prove the fact reported to be true, nevertheless indirectly tends to produce the same effect. From this standpoint, it is easy to classify them as exceptions to the hearsay rule.

Declarations relating to mental state, to physical condition, and to other facts are all treated by the editor under the heading "Spontaneous Statements". This heading, which is similar to the expression used by Wigmore,[2] does not seem accurately descriptive of the subject matter which is included under it. For instance, declarations bearing on intention, mental state or condition, apparently need not be spontaneous in order to be admissible. By a spontaneous statement, (using the term in its ordinary meaning), we mean one free from premeditation. Suppose a man decides, after careful reflection, that he will move from New York to Chicago on the first of the following month, to engage in business; suppose he then says, "I am too busy to write now, but next week I will write to my mother telling her of my intention to move". The next week he does write. Surely such a letter would be good evidence of his intention to move from New York to Chicago,[3] and yet neither his intention to move nor his declaration of that intention can accurately be called "spontaneous".

The heading "Spontaneous Statements as to Other Facts" is used to cover cases dealing with what are ordinarily termed declarations which are part of the *res gesta*. Here again the word "spontaneous"

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[1]"Ipsam potius esse ab onere probandi relevationem quam proprie probationem." Mascard. De Probat, Vol. I, Quaest. 7, n. 1, 10, 11; 1 Greenleaf, Evidence (16th ed., 1899) § 169.

[2]3 Wigmore, Evidence (1904) § 1745.

[3]See Mutual Life Ins. Co. *v.* Hillmon (1892) 145 U. S. 285, 294, 12 Sup. Ct. 909.

is misleading because it states only a half truth. It may be admitted that the reason why declarations are admitted as part of the *res gesta* is because they represent the spontaneous mental reaction of the declarant on the act they describe or qualify. But what is the test of spontaneity? The soundest working test seems to be that of practical identity in time with the *res gesta.* For purposes of admissibility as evidence, that declaration is spontaneous which is contemporaneous with the *res gesta,* and no other declaration is. As a matter of fact, it is perfectly true that declarations made long after the *res gesta* may be spontaneous, but, inasmuch as there is no ready method of determining their spontaneity under such circumstances, they should be rejected as evidence. A rule of evidence, administered, as it must be, in the rapid course of a trial, should be a practical rule; and in the case of the *res gesta* exception to the hearsay rule, spontaneity alone is not a good working test of the admissibility of a declaration. Just as in pedigree cases blood relationship on the part of the declarant to the one whose pedigree is in question makes a pedigree declaration admissible, while intimate friendship does not,[4]—because the first test is simple, workable and in general just, while the second would be unworkable, because of the difficulty of deciding what degree of intimacy would be necessary to make the friend's declaration admissible,—so practical simultaneousness with the *res gesta* is the best working test of the spontaneity and of the accuracy of a hearsay declaration. A second, or even a minute may intervene, and the declaration be still held admissible, because absolute identity in time with the *res gesta* rarely exists. The interval allowed, however, should be very brief. One may disagree with Bedingfield's Case,[5] where the interval was only a minute or two, as being too severe in rejecting the declaration, and one may nevertheless entirely agree with the Connecticut case which held that five minutes was too great an interval.[6]

Obscure as the term *res gesta* is, it seems unfortunate that the cases in the book bearing on this doctrine are not dealt with as a separate subdivision under the heading of the term itself. That this may be done is shown by the wholly admirable treatment of the doctrine of the *res gesta* in Thayer's "Cases on Evidence".[7] Professor Thayer first sets out the less proper uses of the term: in agency cases, where the expression, "part of the *res gesta* of the agency" means merely within the scope of the agent's authority; in rape cases, where the injured woman's declaration is admitted (if soon enough after the injury) in confirmation of her testimony, perhaps a survival of the doctrine of hue and cry;[8] in bankruptcy cases, where the declarations of the bankrupt are admitted to show the intent to commit an act of bankruptcy, cases which are best dealt with as declarations of intention. He then deals with the really proper use of the term, as a declaration accompanying some act which is itself admissible. The result of this treatment is a clear understanding of the term *res gesta,* and of its use and misuse in the law.

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[4]Johnson *v.* Lawson (1824) 2 Bing. 86.

[5]Reg. *v.* Bedingfield (1879) 14 Cox C. C. 341.

[6]McCarrick *v.* Kealy (1898) 70 Conn. 642, 40 Atl. 603.

[7](2nd ed., 1900) 641-672.

[8]*Per* Holmes, J., in Commonwealth *v.* Cleary (1898) 172 Mass. 175, 176, 51 N. E. 746.

The remaining four chapters of Professor Hinton's casebook deal with "Opinions and Conclusions", "Circumstantial Evidence", "The Best Evidence" and "The Parol Evidence Rule". Of these chapters it is sufficient to say that they show the same scholarly care and judicious selection of authorities as the earlier portion of the book. While among the cases we miss an occasional old friend (*e. g., Doe ex dem. Gord* v. *Needs,*[9] on the question of equivocation), we meet with many excellent new ones.

The notes in the book, besides containing many pithy and accurate statements of law, occasionally help to free cases from a certain cryptic element—that is, the connection between a given case and the general topic in hand, or its relation to some outside problem,—which is but too often left unexplained in many casebooks of merit. Frequently the *raison d'être* of a decision's place in a casebook is known only to the compiler and those to whom his secret has been told. This is unfortunate, in that it tends to prevent the use of the book by teachers other than the editor and his pupils. The connection between the cases in Professor Hinton's book is, with the aid of his notes, reasonably clear, a fact which will tend to facilitate its use among all teachers of the law.

In conclusion, it may be truthfully said that the book is a production worthy of the highest praise. Indeed, it is so good a book as hardly to require praise to insure its success. To examine it carefully is to approve it, and the learned and able editor is to be heartily congratulated on his valuable contribution to legal scholarship and to legal education.

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A PRACTICAL TREATISE ON TITLE TO REAL PROPERTY including the compilation and examination of Abstracts with Forms. By GEORGE W. THOMPSON. Indianapolis. THE BOBBS-MERRILL CO. 1919. pp. lxxxii, 1112.

This treatise is for the use of attorneys as well as conveyancers. It opens with an explanation of abstracts in general, the scope of an abstractor's undertaking, his liability for negligence or mistake and his title in the abstract. The second chapter briefly deals with estates, interests and rights in real property. This subject matter is one with which attorneys and conveyancers are likely already to be familiar and might have been omitted, although it is an excellent summary of the subject. In the two next chapters, title in general and methods of acquiring title are dealt with. The five following chapters deal with the public records, the purpose of recording, and notice; with indices, the method of preparation and the formal parts of an abstract; with the beginning and sources of title, various kinds of land interest, school and university land grants, grants to railroads and federal and state patents. Chapter ten gives the history of United States Government land surveys, the divisions into townships and sections and the sub-divisions of the sections with diagrams. This chapter will be of value to eastern attorneys who may not be familiar with land titles in western states.

Subsequent chapters deal with the different parts of a deed and the different kinds of deeds and deeds of various parties, as of married parties, corporations and partnerships and of public officials, and also of leases, mortgages, wills and contracts to sell and convey. Chapters

[9](1836) 2 M. & W. 129.